LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

LORI W. GIRARD
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: March 27, 2000

TO: Marcia McLatchy, Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: Playground Safety

QUESTIONS PRESENTED

1. What are the standards of care imposed by courts of law on playground operators?

2. If State funds are not made available for the purposes of Assembly Bill 1055, is the City required to take any actions?

3. What effects does Assembly Bill 1055 have on the City's liability exposure?

SHORT ANSWERS

1. The standard of care imposed on the City as a playground operator is to take reasonable steps to protect the public against a dangerous condition of public property when the City has notice of that dangerous condition.

2. If State funds are not made available for the repair or replacement of playgrounds, Assembly Bill 1055 requires only that the City inspect its playgrounds by October 1, 2000. The Regulations referred to in Assembly Bill 1055, however, may require the City to modify its current inspection, maintenance, and record-keeping practices.

3. Assembly Bill 1055 should not significantly affect the City's liability exposure with respect to its playgrounds. The required initial inspections and any initial inspection reports should

not result in evidence that is harmful to the City. Further, the mere fact that a particular playground or its equipment does not conform to the Regulations should not impose liability on the City.

INTRODUCTION

Assembly Bill No. 1055 [Bill] amended certain provisions of the California Health and Safety Code relating to the upgrade of public playgrounds, and enacted the Playground Safety and Recycling Act of 1999 [Act].[1] Specifically, the Bill amended Sections 115730 and 115735, and added Sections 115810 through 115816.[2] Prior to enactment of the Bill, cities operating playgrounds were required to upgrade their playgrounds as necessary to satisfy Department of Health Services [DHS] regulations [Regulations], to the extent state funds were made available for that purpose. [3] DHS was required to adopt the Regulations on or before January 1, 1992; however, DHS failed to file the Regulations until 1999.[4]

In response to the DHS delay in issuing the Regulations, the Bill was enacted to, among other things, extend the deadline for compliance with the Regulations by non-public entities.[5] The Bill also added a mandatory date for public agencies to inspect playgrounds in order to aid compliance with the upgrade requirements. In essence, the Bill continues to require cities, among others, to upgrade playground equipment to conform with the Regulations, to the extent state funds are made available.

DISCUSSION

---

[1]All statutory references are to the Health and Safety Code unless stated otherwise. The Bill is attached to this Memorandum as Attachment No. 1.

[2]Sections 115810-115816 authorize the development of a grant program for the purpose of providing funds to local agencies for improving or replacing public playgrounds.

[3]Section 115730 was originally enacted in 1990 as Section 24451.

[4]See Attachment No. 2, AB 1055 Analysis (9-7-99). The Regulations became effective on January 1, 2000. See Attachment No. 3, Cal. Code Regs. tit. 22, §§ 65700-65755 (2000).

[5]See Attachment No. 2.

I. The Standard of Care Imposed on the City as a Playground Operator is to Take Reasonable Steps to Protect Against Known Dangerous Conditions of Public Property.

Section 115725 requires the Regulations to meet the "standard of care" imposed on "playground operators." Specifically, the section provides:

> On or before January 1, 1992, the state department . . . shall adopt regulations for the design, installation, inspection, maintenance, and supervision where appropriate, and training of personnel involved in the design, installation, and maintenance, of all playgrounds either operated by public agencies, including a state agency, city, county, city and county, school district, and any other district, or operated by any entity where the playground is open to the public. *Those regulations shall meet the standard of care imposed by courts of law on playground operators . . . .*

Cal. Health & Safety Code § 115725 (emphasis added).

The City is a public entity, and a public entity may be liable for injuries caused by a dangerous condition of its property only as provided by statute.[6] *Schonfeldt v. State of California*, 61 Cal. App. 4th 1462, 1465 (1998). The California Tort Claims Act [Tort Claims Act] describes under what circumstances a public entity may be liable for a dangerous condition of its property. *Id.*; *see also* Cal. Gov't Code §§ 830-840.6. Specifically, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that the public entity had actual or constructive notice of the dangerous condition. *Id*. citing Cal. Gov't Code § 835.

A dangerous condition is defined as a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when the property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used. Cal. Gov't Code § 830(a). Whether a condition creates a substantial risk of injury depends on how the general public, including children, who are held to a lower standard of care, would use the property exercising due care. *Schonfeldt*, 61 Cal. App. 4th at 1466. Even if it is foreseeable, however, that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons. *Mathews v. City of Cerritos*, 2 Cal.

---

[6]From a legal standpoint, the City is concerned only with its liability as a playground operator. As such, this Memorandum only discusses the standard of care imposed on the City.

App. 4th 1380, 1384 (1992) (dangerous condition not established merely because common for children to ride bikes down steep hill located in city park).

The fact that public property does not meet applicable regulations does not, by itself, establish that the property is in a dangerous condition. *See Schonfeldt*, 61 Cal. App. 4th at 1468 (dangerous condition of freeway not established by fact that fence was slightly shorter than state guidelines). What constitutes a dangerous condition is usually a question of fact, and may only be resolved as a question of law if reasonable minds can come to only one conclusion. *Schonfeldt*, 61 Cal. App. 4th at 1465, citing *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 810 (1984). When a public entity has actual or constructive notice of a dangerous condition of its property, it has a duty to take reasonable steps to protect the public from the danger even if the danger is not necessarily created by the entity. *Constantinescu v. Conejo Valley Unified School Dist.*, 16 Cal. App. 4th 1466, 1475 (1993).

Thus, as a public entity, the City may be liable for injuries only as expressly provided by statute. When an injury is allegedly caused by a dangerous condition of a playground, a plaintiff must prove all of the necessary elements set forth in the Tort Claims Act. Under the Tort Claims Act, the "standard of care" imposed on the City as a playground operator is to take reasonable steps to protect the public against a dangerous condition of public property when the City has notice of that dangerous condition.

II. If State Funds are Not Made Available, the Bill Only Requires the City to Inspect its Playgrounds, but the Regulations May Require Modifications to the City's Inspection, Maintenance, and Record-Keeping Practices.

The Bill does not require the City to take any action with respect to replacing or improving playgrounds if funds are not made available from the State. The Bill does require, however, that the City inspect its playgrounds. The Regulations, on the other hand, may require the City to modify its inspection, maintenance, and record-keeping practices.

A. If State Funds are Not Made Available, the Bill Only Requires the City to Inspect its Playgrounds.

The Bill provides, in pertinent part:

> (a) All public agencies operating playgrounds, including a . . . city . . . *shall upgrade their playgrounds* by replacement or improvement as necessary to satisfy the regulations adopted pursuant to Section 115725 *to the extent state funds are made available specifically for that purpose* through state bonds or other means. All other entities operating playgrounds open to the public shall upgrade their

playgrounds by replacement or improvement, as necessary to satisfy the regulations adopted pursuant to Section 115725, on or before January 1, 2003.

(b)(1) Subdivision (a) and the regulations adopted pursuant to Section 115725 shall not apply to playgrounds installed between January 1, 1994, and December 31, 1999. Those playgrounds shall be subject to the requirements to upgrade set forth in this subdivision until 15 years after the date those playgrounds were installed, at which time those playgrounds shall be subject to subdivision (a) and the regulations adopted pursuant to section 115725.

(b)(2) All public agencies operating playgrounds installed between January 1, 1994, and December 31, 1999, *shall upgrade those playgrounds* by replacement or improvement as necessary to satisfy criteria that are at least as protective as the guidelines in the Handbook for Public Playground safety, Publication Number 325, United States Consumer Product Safety Commission, November 1994, *to the extent that state funds are made available specifically for that purpose* through state bonds or other means.

. . .

(c) Before October 1, 2000, all public agencies operating playgrounds . . . *shall have a playground safety inspector*, certified by the National Playground Safety Institute, *conduct an initial inspection* for the purposes of aiding compliance with the requirements to upgrade set forth in subdivision (a) or (b), as applicable. *Any* inspection report *may* serve as a reference when the upgrades are made, but *is not intended for any other use*.

Cal. Health & Safety Code § 115730 (emphasis added).

Thus, under the plain language of the Bill, if state funds are not made available, the only action required of the City is to inspect its playgrounds prior to October 1, 2000.[7] The Bill clearly states that upgrades are required only to the extent state funds are made available. Cal. Health &

[7]The Bill does not provide for a method of enforcement or for penalties for failure to comply. No regulatory agency, including the DHS, is responsible for enforcing any of the regulations. *See* Stats 1999, ch 712 (AB 1055); Cal. Health & Safety Code § 115725; Attachment No. 4, Electronic Mail from DHS dated 11/10/99.

Safety Code § 115730(a), (b)(2). Further, the Bill does not require the City to generate initial inspection reports. Instead, the Bill merely states that "[*a]ny* inspection report *may* serve as a reference." Cal. Health & Safety Code § 115730(c); see also Attachment No. 5, AB 1055 Analysis (9-8-99) (Senate amends Bill to clarify that an inspection report *may be written* to serve as a reference when upgrades are made, but is not intended for any other use).[8]

B. The Regulations May Require the City to Modify its Inspection, Maintenance, and Record-Keeping Practices.

The Regulations may require the City to modify certain inspection, maintenance, and record-keeping practices. As set forth above, the Regulations were adopted by DHS pursuant to legislative direction. *See* Cal. Health & Safety Code § 115725. The Regulations require the City, based on the initial inspection, to implement any changes in playground inspection and maintenance that are necessary to comply with the Regulations. Cal. Code Regs. tit. 22, §§ 65715 (2000). The Regulations further require the City to maintain and inspect its playgrounds in accordance with the 1997 Handbook for Public Playground Safety (CPSC Handbook) and the 1998 Standard Consumer Safety Performance Specification for Playground Equipment for Public Use (ASTM Standard). Cal. Code Regs. tit. 22, §§ 65735 (2000).

Specifically, the Regulations require that the manufacturer's maintenance instructions and recommended inspection schedules for playground equipment be strictly followed. See Attachment No. 6, CPSC Handbook, section 7.2.[9] The Regulations also require the City to develop a comprehensive maintenance program for each playground. *Id*. Further, the City must establish and maintain detailed installation, inspection, maintenance, and repair records for each playground equipment area. *Id*.; see also Attachment No. 7, ASTM Standard, section 13.

We do not have the necessary information at this time to determine whether and to what extent the Regulations will require the City to modify its current inspection, maintenance, and record-keeping practices. We will, however, be happy to work with the Park and Recreation Department on the specifics of implementing the Regulations when the initial inspections have been completed.

III. The Bill Should Not Significantly Affect the City's Liability Exposure with Respect to its Playgrounds.

---

[8]If an inspection report was required, the Legislature arguably would have explicitly set forth that intent. For example, the Legislature could have stated: "The safety inspector *shall* create an inspection report."

[9]Pursuant to the Regulations, all CPSC Handbook recommendations are considered mandatory requirements. *See* Cal. Code Regs. tit. 22, § 65710 (2000).

The Bill should not significantly affect the City's exposure to liability for dangerous conditions of its playgrounds. The fact that the City has conducted initial inspections or created initial inspection reports should not significantly increase the City's liability exposure. Further, the mere fact that a particular playground or piece of equipment does not conform to the Regulations should not significantly increase the City's liability.

A. Conducting Initial Inspections or Creating Initial Inspection Reports Should Not Significantly Affect the City's Liability.

The fact that the City has conducted an initial inspection or created an initial inspection report should not significantly increase the City's liability exposure for dangerous conditions of its playgrounds. As explained above, the Bill requires the City to conduct initial inspections of its playgrounds by October 1, 2000, but does not require the City to generate initial inspection reports. *See* Cal. Health & Safety Code § 115730(c). The concern with conducting initial inspections or creating initial inspection reports would be that after the inspections the City would arguably have actual notice of any dangerous conditions of its playgrounds.

As explained in Section I, the standard of care imposed on the City as a playground operator is to take reasonable steps to protect the public against a dangerous condition of public property when the City has notice of that dangerous condition. The fact that the City does not have actual notice of a dangerous condition does not necessarily absolve the City from liability. A plaintiff can establish that the City had constructive notice of a dangerous condition if the condition has existed for a substantial period of time and is of an obvious nature. *See* Cal. Gov't Code § 835.2(b).

It is not clear whether the fact that an inspection was performed or the inspection reports themselves would be admissible as evidence to prove that the City had notice of a dangerous condition of its playground. The Bill provides that any inspection report generated as a result of the initial inspection may serve as a reference for future upgrades, but it not "intended" for any other use. Cal. Health & Safety Code § 115730(c). Additionally, the Bill specifically provides that "[t]his section *shall not* affect the liability or absence of liability of playground operators." Cal. Health & Safety Code § 115730(d) (emphasis added). Further, when Section 115730 was originally enacted, the Legislature specifically expressed that: "It is not the intent of the Legislature that these regulations shall serve either to shield against liability or to create liability for a playground operator." Stats 1990, ch 1163, §1 (SB 2733). Thus, an argument could be made that using the report as evidence to prove notice would directly contravene the legislative intent.

It is possible, however, that a court would reason that if the Legislature intended the inspections or the reports to be inadmissible, the Legislature would have clearly expressed that

intent. Nonetheless, admission of the inspections or the reports should not significantly increase the City's liability exposure. An inspection should either result in the elimination of a dangerous condition within a reasonable time, or in the conclusion that there is not a dangerous condition to eliminate.

Presumably, when the City has completed an initial inspection, any dangerous conditions observed by the City will be noted in the initial inspection report and eliminated.[10] The absence of a claimed defect in the report would be evidence tending to prove that the City did not have notice of an alleged dangerous condition. In addition, the inspections would provide the City with the opportunity to correct conditions that the City could be held liable for on a constructive notice theory. Thus, although the inspections and reports could be used against the City as evidence that the City had notice of a dangerous condition, that evidence should not be harmful to the City. In fact, the City may desire to use that evidence in its defense.

B. The Mere Fact that a Particular Playground or Piece of Playground Equipment Does Not Conform to the Regulations Should Not Significantly Increase the City's Liability Exposure.

Merely because a particular playground or piece of playground equipment does not conform to the Regulations should not significantly increase the City's liability exposure for dangerous conditions of its playgrounds. For example, an injured party may attempt to claim that a playground or its equipment constitutes a dangerous condition merely because it does not comply with the Regulations. As explained above, the Legislature clearly did not intend the Regulations and upgrade requirements to create liability for a playground operator. *See* Stats 1990, ch 1163 § 1 (SB 2733); Cal. Health & Safety Code § 115730(d). Pursuant to the Legislature's intent, the Regulations should not be admissible as conclusive evidence that a particular playground or piece of playground equipment is dangerous.

Additionally, a plaintiff injured on a playground that did not conform to the Regulations could claim that the City is liable for failure to comply with the Bill or with the Regulations. Under certain circumstances, the City may be liable for injuries if it fails to act as required by a statute. If the statute is designed to protect against the kind of risk of injury suffered, the City could be liable for those injuries unless it can show that it exercised reasonable diligence to act as required by the statute. Cal. Gov't Code § 815.6; *Posey v. State of California,* 180 Cal. App. 3d 836, 848 (1986). Here, a claim based on failure to comply with the Bill or the Regulations should

---

[10]As explained above, the Bill does not require the City to generate formal inspection reports. Cal. Health & Safety Code § 115730(c). As a practical matter, however, the City should generate inspection reports in order to identify any potential dangerous conditions, and to identify and prioritize any future equipment upgrades.

fail because the Legislature clearly stated that the Bill and Regulations are not intended to create liability for playground operators.

Finally, in a case involving playground equipment that does not comply with the Regulations, the City should be immune from liability in many cases. The Tort Claims Act provides the City a design immunity, which states:

> Neither a public entity nor a public employee is liable . . . for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

Cal. Gov't Code § 830.6.

The design immunity is an affirmative defense that must be pled and proved by the City. *Bane v. State of California*, 208 Cal. App. 3d 860, 866-67 (1989). The design need not be created by a public employee, nor does it have to be signed by a public employee. *Id*. at 868-69. The immunity can be lost, however, if the City is placed on notice that the design is dangerous and fails to take remedial measures within a reasonable time period. *Id*. at 875.

Here, if the design of a particular playground or piece of playground equipment was approved by an authorized City employee, the City should be immune from liability if the design complied with the regulations that were in effect at the time of the approval. If, however, the City is on notice that the previously approved design has become unreasonable or is now known to be dangerous, the immunity would not apply. As such, the City should repair, replace, or barricade any playground equipment that it determines to constitute a dangerous condition of public property.

CONCLUSION

First, for the purposes of the Regulations, the standard of care imposed on the City as a playground operator is to protect the public against known dangerous conditions of its property. Second, if state funds are not made available for upgrades, the Bill only requires the City to inspect its playgrounds by October 1, 2000. The Regulations, on the other hand, may require the City to modify its inspection, maintenance, or record-keeping practices.

Third, the Bill should not significantly affect the City's liability exposure for dangerous conditions of its playgrounds. Conducting initial inspections or creating initial inspection reports should not result in evidence harmful to the City. Further, the mere fact that a particular playground or its equipment does not comply with the Regulations should not establish City liability. Irrespective of the Bill and the Regulations, however, any playground or piece of playground equipment that the City determines to be dangerous should be closed, repaired, or replaced.

CASEY GWINN, City Attorney

/ S /

By
Lori W. Girard
Deputy City Attorney

LWG:cdk(043.2;263.20)
ML-2000-8

Attachments